

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

RICHARD C. BUTT,)	
)	
<i>Plaintiff</i>)	
)	
v.)	<i>Docket No. 99-39-P-H</i>
)	
CHRISTOPHER W. HAMM, et al.,)	
)	
<i>Defendants</i>)	

***RECOMMENDED DECISION ON DEFENDANTS’ MOTION TO DISMISS
FOR LACK OF PERSONAL JURISDICTION AND IMPROPER VENUE***

Defendants Christopher W. Hamm and The Memorial Group, Inc. (“Memorial Group”) move to dismiss the instant employment-breach action pursuant to Fed. R. Civ. P. 12(b)(2) and (3) for lack of personal jurisdiction and improper venue. Defendants’ Motion To Dismiss for Lack of Personal Jurisdiction, etc. (Docket No. 3). For the reasons discussed below, I recommend that the motion be denied.

I. Applicable Legal Standards

A motion to dismiss for lack of personal jurisdiction raises the question whether a defendant has “purposefully established minimum contacts in the forum State.” *Hancock v. Delta Air Lines, Inc.*, 793 F. Supp. 366, 367 (D. Me. 1992) (citation and internal quotation marks omitted). The plaintiff bears the burden of establishing jurisdiction; however, where (as here) the court rules on a Rule 12(b)(2) motion without holding an evidentiary hearing, a *prima facie* showing suffices.

Archibald v. Archibald, 826 F. Supp. 26, 28 (D. Me. 1993). Such a showing requires more than mere reference to unsupported allegations in the plaintiff's pleadings. *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 675 (1st Cir. 1992). However, for purposes of considering a Rule 12(b)(2) motion the court will accept properly supported proffers of evidence as true. *Id.*

The filing of a Rule 12(b)(3) motion likewise places the burden on the plaintiff to demonstrate the propriety of venue. 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1352 at 264-65 (2d ed. 1990). As in the case of a Rule 12(b)(2) motion, the court accepts a plaintiff's properly supported proffers of evidence as true. *M.K.C. Equip. Co. v. M.A.I.L. Code, Inc.*, 843 F. Supp. 679, 682-83 (D. Kan. 1994).

II. Factual Background

The following facts, with conflicts resolved in favor of the plaintiff's properly supported proffers of evidence, are relevant to a consideration of the pending motion.

Memorial Group, a Delaware corporation with its principal place of business in Houston, Texas, is in the business of managing mutual funds. Affidavit of Christopher W. Hamm ("Hamm Aff."), attached as Exh. A to Defendants' Memorandum of Law in Support of Their Motion To Dismiss, etc. ("Defendants' Memorandum") (Docket No. 3), ¶ 2. Hamm, a Texas resident, is president and sole shareholder of Memorial Group. *Id.* ¶¶ 2-3; Affidavit of Richard C. Butt in Support of Objection, etc. ("Butt Aff.") (Docket No. 5) ¶ 16 & Exh. B thereto at 3. Memorial Group never has maintained an office in, or possessed a certificate authorizing it to conduct business in, Maine. Hamm Aff. ¶ 4. Hamm has never resided or worked in Maine. *Id.* ¶ 3.

Among the mutual funds for which Memorial Group provides certain shareholder services

are The Memorial Funds (“Funds”).¹ Butt Aff. ¶ 7 & Exh. B thereto at 3. The Funds are a group of Portland, Maine-based mutual funds created as investment vehicles for funeral home directors who receive prepayments of funeral expenses from their customers.² Butt Aff. ¶ 3. Memorial Group participated in organizing the Funds in 1998 with assistance from the Forum Financial Group of Companies (“Forum”), based in Portland, Maine.³ *Id.* ¶¶ 3-4. Hamm, who became chairman of the board and president of the Funds, exercised day-to-day control over them subject to the oversight of the board. *Id.* ¶ 8; *see also* Exh. B thereto at 24. Butt, a resident of Cumberland County, Maine, was employed by Forum at the time the Funds were organized. Butt Aff. ¶¶ 1, 4. In that capacity, Butt communicated directly with Hamm concerning the creation, management and operation of the Funds. *Id.* ¶ 4.

In the spring and summer of 1998 Memorial Group became dissatisfied with the services Forum was providing to the Funds. *Id.* ¶ 9. Hamm complained to Forum and to Butt personally about the quality of service. *Id.* At about the same time, Butt’s employment with Forum ended. *Id.* ¶ 10. Hamm asked Butt to work for Memorial Group starting on July 1, 1998.⁴ *Id.* & Exh. C thereto. In the summer and fall of 1998, Butt’s work for Memorial Group encompassed active oversight over

¹Memorial Group is compensated for these services on a percentage basis. Butt Aff. ¶ 7 & Exh. B thereto at 3.

²The Funds are registered as a Delaware business trust with an address of Forum Financial Group, Two Portland Square, Portland, Maine 04101. Butt Aff. ¶ 6 & Exh. B thereto at 1.

³Memorial Group purchased seed capital shares of the Funds on or about March 10, 1998 for \$100,000. Butt Aff. ¶ 5 & Exh. A thereto at 151-52.

⁴The defendants deny that any offer of employment ever was made to Butt. *See* Hamm Aff. ¶¶ 5-7. They instead state that the parties engaged in inconclusive negotiations that included two visits by Butt to Texas, one visit by Hamm to Maine and communications by phone and in writing, including the exchange of draft proposals. *Id.*

Forum's administration of the Funds, including approximately six meetings with Forum management at its offices in Portland, Maine. *Id.* ¶ 11. These meetings were held, and subjects of discussion chosen, at the direction of Hamm and Memorial Group. *Id.* Butt also assisted in the marketing of the Funds to third parties. *Id.* ¶ 12. Throughout July, August and September 1998 Butt communicated with, and received specific directions from, Hamm by telephone and e-mail. *Id.* ¶ 13. Hamm travelled to Maine twice in 1998, once in connection with the launch of the Funds in March and once in August to discuss his dissatisfaction with Forum's services and Butt's work on Hamm's and Memorial Group's behalf. *Id.* ¶ 15. Butt performed the majority of services for Memorial Group while he was in Maine. *Id.* ¶ 17. Many of these services involved contact with persons at Forum who live and work in Maine. *Id.*

On December 23, 1998 Butt filed the instant suit in Superior Court, Cumberland County, Maine. Complaint, attached to Notice of Removal (Docket No. 1), at 1. Butt alleged that the defendants had agreed to pay him \$12,500 per month for his services with three months' prior notice of termination. *Id.* ¶ 4. He stated that, pursuant to the agreement, he invoiced the defendants for services performed from July through October 1998 but that the defendants had paid only one month's invoice.⁵ *Id.* ¶¶ 6-7. He sought recovery on two theories — damages, interest, costs and attorneys' fees pursuant to 26 M.R.S.A. §§ 626 and 626-A for breach of agreement (Count I) or the amount promised, together with interest and costs, on a theory of promissory estoppel (Count II). *Id.* ¶¶ 8-14. By notice of removal filed February 18, 1999 the defendants removed the action to this court, premising jurisdiction on diversity of citizenship. Notice of Removal at 1-2. The instant

⁵Hamm states that "[e]ven though I did not feel contractually bound to do so, I paid one of [Butt's] invoices to compensate Butt for his time and energy expended compiling business proposals during our negotiations." Hamm Aff. ¶ 7.

motion to dismiss shortly followed.

III. Discussion

A. Personal Jurisdiction

In a case in which the court's jurisdiction is based upon the diverse residence of the parties, the court's personal jurisdiction over a non-resident defendant is governed by the forum state's long-arm jurisdiction statute. *American Express Int'l, Inc. v. Mendez-Capellan*, 889 F.2d 1175, 1178 (1st Cir. 1989). Maine's long-arm jurisdiction statute, which declares that it is to be applied "so as to assert jurisdiction over nonresident defendants to the fullest extent permitted by the due process clause of the United States Constitution, 14th amendment," 14 M.R.S.A. § 704-A(1), provides in relevant part:

2. Causes of action. Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated in this section, thereby submits such person, and, if an individual, his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of such acts:

A. The transaction of any business within this State;

* * *

F. Contracting to supply services or things within this State;

* * *

I. Maintain any other relation to the State or to persons or property which affords a basis for the exercise of jurisdiction by the courts of this State consistent with the Constitution of the United States.

* * *

4. Jurisdiction based upon this section. Only causes of action arising from acts enumerated herein may be asserted against a defendant in

an action in which jurisdiction over him is based upon this section.

14 M.R.S.A. § 704-A.

A court may have general or specific personal jurisdiction over the defendants in an action. General jurisdiction arises when the defendant has engaged in substantial or systematic and continuous activity, unrelated to the subject matter of the action, in the forum state. *Scott v. Jones*, 984 F.Supp. 37, 43 (D. Me. 1997). Specific jurisdiction is based on a relationship between the forum and the particular acts or injuries that provide the basis for the action, that is, “where the cause of action arises directly out of, or relates to, the defendant’s forum-based contacts.” *United Elec., Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1088-89 (1st Cir. 1992). The Maine long-arm statute provides only for the exercise of specific jurisdiction, *Lorelei Corp. v. County of Guadalupe*, 940 F.2d 717, 720 (1st Cir. 1991), and the plaintiff does not appear to press a contention of general jurisdiction, *see generally* Defendant Richard C. Butt’s Objection to Defendants’ Motion, etc. (“Plaintiff’s Memorandum”) (Docket No. 4).

The First Circuit has developed the following test to evaluate the appropriateness of the exercise of specific jurisdiction:

First, the claim underlying the litigation must directly arise out of, or relate to, the defendant’s forum-state activities. Second, the defendant’s in-state contacts must represent a purposeful availment of the privilege of conducting activities in the forum state, thereby invoking the benefits and protections of that state’s laws and making the defendant’s involuntary presence before the state’s courts foreseeable. Third, the exercise of jurisdiction must, in light of the Gestalt factors, be reasonable.

163 Pleasant St., 960 F.2d at 1089. The “Gestalt factors” comprise

(1) the defendant’s burden of appearing, (2) the forum state’s interest in adjudicating the dispute, (3) the plaintiff’s interest in obtaining convenient and effective relief, (4) the judicial system’s interest in obtaining the most

effective resolution of the controversy, and (5) the common interests of all sovereigns in promoting substantive social policies.

Id. at 1088.

The claims asserted in the complaint clearly arise out of or relate to Memorial Group's and Hamm's forum activities, including, per Maine's long-arm statute, the "transaction of any business" and "[c]ontracting to supply services or things" within Maine (namely, services to the Funds). Memorial Group and Hamm participated in organizing, and continue to help manage, the Maine-based Funds. In this connection they met Butt, a Maine resident. They negotiated with Butt concerning possible employment (and, in Butt's version, hired him and subsequently supervised him) by means of a series of contacts with Butt in Maine by telephone, mail, e-mail and in one case a personal visit to by Hamm to Maine.⁶ The asserted employment agreement, which concerned the management of the Funds, forms the subject matter of the complaint.⁷

That the defendants meet the second test, purposeful availment, also cannot seriously be doubted. Memorial Group and Hamm, its agent and sole shareholder, chose to transact business in Maine by participating in the setup and management of the Funds. Memorial Group receives

⁶Although a random or isolated telephone call would not constitute a significant contact, the telephone contacts at issue here were both related to the subject matter of the claim and formed part of a pattern of regular communication. *See Scott*, 984 F. Supp. at 44-45 (noting that plaintiff's claim arose directly from telephone conversation between Maine and non-Maine defendants and that the defendants' ongoing business relationship, including specific telephone call in question, made it foreseeable that non-Maine defendant might be haled into court in Maine as result of mutually beneficial, continuing relationship with Maine defendant).

⁷The defendants argue that their contacts with the Funds have nothing to do with the instant employment-breach action, noting for example that the Funds are not a party thereto. Defendants' Reply in Support of Their Motion To Dismiss, etc. (Docket No. 7) at 3-4. Because the defendants' relationship with Butt arose out of their dealings with the Funds, and Butt's alleged employment concerned the Funds, I find the two sets of contacts (with Butt and the Funds) intertwined.

compensation for its role in the Funds' management. The defendants likewise chose to negotiate with Butt, a Maine resident, concerning his services in helping to administer the Maine-based Funds. Butt's work on behalf of the defendants was undertaken mostly in Maine, from where Butt sent invoices and where he expected to receive compensation. These contacts were neither random nor fortuitous. It should have come as no surprise to these defendants that they might be haled into court in Maine in matters related to the Funds.⁸ See, e.g., *Howell Lab., Inc. v. Clear Channel Communications, Inc.*, 751 F. Supp. 258, 261 (D. Me. 1990) ("the negotiations with Maine residents and the solicitation of goods and services here indicate a material invocation of the benefits and privileges of the Maine market.") (citation and internal quotation marks omitted).

Turning to the final consideration, I find the exercise of jurisdiction wholly reasonable in this case. Hamm avers that "[t]raveling to Maine to defend this suit would impose a great burden on me and Memorial Group." Hamm Aff. ¶ 8. However, he does not say how this would be so. His conclusory statement is unpersuasive. See *Smirz v. Fred C. Gloeckner & Co.*, 732 F. Supp. 1205, 1208 (D. Me. 1990) (defendant who purposefully directs activities toward Maine shoulders burden of providing compelling evidence why exercise of jurisdiction would be unreasonable). The forum state, Maine, has a strong interest in adjudicating this dispute, which implicates Maine statutory and common law and the right of one of its citizens to be compensated fairly for work performed largely

⁸The defendants point out that the mere fact that a person enters into a contract with a party in another state does not confer personal jurisdiction. Defendants' Memorandum at 8-9 (citing *Ganis Corp. of Cal. v. Jackson*, 822 F.2d 194, 197 (1st Cir. 1987)). They contend that this case is devoid either of a contract based on meeting of the minds or any additional "plus" factors beyond the formation of an alleged contract. *Id.* For purposes of this motion, however, I take the plaintiff's supported proffers of evidence, which include the assertion that he was hired by the defendants, as true. There are, moreover, significant connections beyond (but related to) the asserted employment contract, most notably the defendants' connection with the Maine-based Funds that the plaintiff purportedly was hired to help manage.

within the state. The plaintiff has an obvious interest in obtaining convenient relief in his home state.⁹

The defendants question whether the interests of judicial efficiency would be served by the Maine situs inasmuch as Memorial Group's corporate records are maintained in Texas and "the individuals with relevant knowledge of [Hamm's] dealings with Butt are — with the exception of Butt himself — located in Houston, Texas." Hamm Aff. ¶ 8; *see also* Defendants' Memorandum at 10. The plaintiff effectively rejoins that, in this simple employment action with respect to which the defendants allege there is no written contract, it is questionable how many of the corporate records of Memorial Group would be relevant. Plaintiff's Memorandum at 8. Further, the plaintiff avers that most of his activities on behalf of Memorial Group took place in Maine and concerned dealings with other Maine residents, particularly those working for Forum. *Id.* at 9; Butt Aff. ¶ 17. Thus, the bulk of the relevant evidence appears to be situated in Maine. The final factor — the common interest of all sovereigns in promoting social policies — likewise counsels in favor of the assertion of jurisdiction in Maine. The complaint implicates the substantive policy of Maine. The defendants do not demonstrate that the substantive policy of Texas or any other state has a bearing on resolution of the dispute.

B. Venue

Having concluded that the court may assert personal jurisdiction over the defendants, I readily determine that venue is proper as well. Venue is governed by 28 U.S.C. § 1391, which provides in relevant part:

⁹This interest is heightened by the fact that the plaintiff, at least as of the date of his affidavit (March 10, 1999), had not been regularly employed since his services for the defendants terminated in November 1998. Butt Aff. ¶ 18.

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

Maine qualifies in this case as a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred. Memorial Group chose to help organize and administer a group of Maine-based investment vehicles. Because of the defendants' involvement with the Funds, they came into contact with Butt. They then hired Butt (or at a minimum negotiated with him) to perform duties related to the Maine-based Funds. These duties were performed largely from Maine and in Maine. That Butt twice travelled to Texas, and that many contacts took the form of telephone, mail and e-mail contacts between Butt in Maine and the defendants in Texas, does not undermine the substantiality of the nexus between the alleged employment contract and Maine.

IV. Conclusion

For the foregoing reasons, I recommend that the defendants' motion to dismiss be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 21st day of May, 1999.

*David M. Cohen
United States Magistrate Judge*